shares plus cash was held to retain its character as such notwithstanding that the vendor shareholders were obliged under the overall scheme to sell one-third of the consideration shares issued to them thereby destroying the substantial identity of ownership. The Court of Appeal upheld the decision of Templeman J. in that case that the claim for relief failed because the consideration was not simply the issue of shares but the issue of shares subject to an obligation imposed as part of the general arrangement to transfer them to another company for cash should the company exercise an option to acquire them.

It must be pointed out that the position taken by the appellant is that the whole exercise including the sale by PLC of its shares in the appellant to Pradaz for cash is part and parcel of one scheme of reconstruction or amalgamation. Having heard the parties and perused the record of appeal, we do not consider that the learned judge has gone out of the ambit of the statement of case as presented and argued before him. For reasons given, we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

There is one other matter which, although not directly related to this appeal, has been brought to our attention. That is the question of procedure to be followed generally in an appeal from the Collector. First, we must remember the Collector of Stamp Duties is merely a civil servant and not legally qualified like an officer of the Judicial and Legal Service. He may have difficulty in drafting a case stated without legal assistance. If one has occasion to see a case stated in an income tax appeal, then one would realize its technicality. But then the Chairman of the Special Commissioners on Income Tax has always been a legally qualified person of some seniority. Taylor J. in *Cheong Yok Choy & Anor.* v. *The Collector of Stamp Duties, Kuala Lumpur*[4] at p. 278 stated:

"... The general practice is for the appellants' legal advisers to make the first draft of the case and send it to the respondent's advisers for their consideration, after which it is submitted to the presiding officer who alone can settle accurately that part of the document which expresses his findings of fact and his opinion on the points requiring decision. It may be necessary for the parties to attend before the tribunal for final revision of the draft. The essence of a case stated is a joint statement by all three of the facts and of the outstanding issues, so that the appellate court has the whole matter before it in the most concise form..."

The reason is as valid today as it was 37 years ago.

On the question of filing of the notice of appeal with the Collector, we think Harun J.'s suggestion is, as admitted by the respondent's counsel, administratively sound and convenient. The Collector will then know his decision is under appeal.

Since there is a conflict of views expressed by the two judges on the question of procedure relating to an appeal from the Collector to the High Court, we consider that this matter should be referred to the respective Chief Justice of the High Court to be dealt with by means of a Practice Note as to the most suitable procedure to be followed. This is important because Sabah and Sarawak have their own Stamp Ordinances.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. HIGHLANDS MALAYA PLANTATIONS LTD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) 14 July 1987 & 30 January 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 13 of 1987]

Revenue Law – Whether payments made by a company to its managerial staff by way of a profit distribution and incentive scheme are bonuses – Bonus or commission – Statutory interpretation – Income Tax Act 1967, ss. 13(1)(a), 33 and 39(1)(h).

In this case, the respondent was a company which was a subsidiary of Highlands & Lowlands Para Rubber Co. Ltd., which was one of a group of 11 companies owned by the principal company. In compliance with the policy of the group, the managerial staff were paid additional remuneration in accordance with the bonus scheme. They were each paid a monthly salary and in addition they were entitled to participate in the group bonus scheme in accordance with the standard letters of appointment. The scheme was based on a number of factors, *viz.* status of employees, amount of salary drawn, duration of service and planted acreage managed, for which points were given for equitable distribution of a provision created by reserving 4% of the agricultural profits of the group. The amount of payment varied with the number of points earned by each participant. For the year of assessment 1975, the appellant disallowed for deduction from the gross income of the respondent the bonus paid to the managerial staff pursuant to the scheme in excess of the limits stipulated in section 39(1)(h) of the Income Tax Act 1967. Accordingly by a notice of assessment in 1980, the appellant informed the

respondent that an additional assessment in the sum of $319,066.50 had been made for the year of assessment 1975.

The respondent contended that the additional remuneration paid to the managerial staff under the group bonus scheme was actually a commission while the appellant argued that it was a bonus payment. The question for the determination of the Special Commissioners was:

"Whether the additional remuneration paid to the administrative staff (*i.e.* the managerial staff) of the (company) under the scheme is a commission and therefore deductible as an expense wholly and exclusively incurred in the production of gross income of the (company) within the meaning of section 33 of the Income Tax Act 1967; or is a bonus payment within the meaning of section 39(1)(h) of the Act and therefore be disallowed as a deductible expense beyond the limits stipulated therein."

The Special Commissioners decided that it was a bonus payment. On appeal to the High Court, Harun J. disagreed and held that it was a commission (see [1987] 2 M.L.J. 515). The appellant appealed.

Held, allowing the appeal: (1) a "bonus" in such a case as the present is in truth nothing else but an euphemism for "addition to wages". The payment may be gratuitous as in the case of the non-managerial staff or it may be payment to which the managerial staff are entitled as incentive but nevertheless it was still a bonus;

(2) the payment may be contractual but that does not make it a "commission". It seems ridiculous to pay the non-managerial staff a bonus and the managerial staff a commission just because it is contractual. Also, the employers have clearly expressed the scheme to be a bonus scheme from the beginning;

(3) the appeal should therefore be allowed and the decision of the Special Commissioners restored.

Cases referred to:

(1) *Shelford* v. *Mosey* [1917] 1 K.B. 154 (consd).
(2) *Sutton* v. *Attorney-General* (1923) 39 T.L.R. 294 (consd).
(3) *Drielsma* v. *Marifold* [1894] 3 Ch. 100 (refd).
(4) *International Investment Ltd.* v. *Comptroller-General of Inland Revenue* [1979] 1 M.L.J. 4 (refd).
(5) *Green* v. *Bartlett* (1863) 32 L.J.C.P. 261 (refd).
(6) *Wolfson* v. *Commissioners of Inland Revenue* 31 T.C. 141 (cited).
(7) *R.* v. *Tolson* (1889) 23 Q.B.D. 168, 175 (refd).
(8) *Lord Howard de Walden* v. *I.R.C.* [1948] 2 All E.R. 825 (refd).
(9) *Lord Vestey's Executors* v. *I.R.C.* [1949] 1 All E.R. 1108 (refd).
(10) *I.R.C.* v. *Ross & Coulter* [1948] 1 All E.R. 616, 634 (refd).
(11) *Atkinson* v. *Goodlass Wall & Lead Industries Ltd.* 31 T.C. 447, 462 (refd).
(12) *Hughes* v. *Bank of New Zealand* 21 T.C. 472, 522 (refd).
(13) *Comptroller-General of Inland Revenue, Malaysia* v. *T.* [1970] 2 M.L.J. 35 (refd).
(14) *Re Eddystone Marine Insurance* (1894) W.N. 30 (refd).
(15) *Commissioners of Inland Revnue* v. *Wesleyan and General Assurance Society* 30 T.C. 11 (cited).
(16) *Great Western Garment Co. Ltd.* v. *Minister of National Revenue* (1947) Ex. C.R. 458 (cited).

SUPREME COURT.

Abdul Hamid bin Haji Mohamed (Senior Federal Counsel) for the appellant.

S. Woodhull for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the court): This appeal is against the decision of Harun J. arising from an appeal by way of case stated from the Special Commissioners of Income Tax. The only question in this appeal is whether the payments made by the respondent by way of a profit distribution and incentive scheme introduced in 1961 is a bonus as contended by the appellant or a commission as contended by the respondent. In other words, the only dispute is the legal effect of the documents and the facts giving rise to the question whether the additional remuneration paid to the managerial staff under the group bonus scheme was a bonus under section 39(1)(h) of the Income Tax Act 1967.

The facts are not in dispute. The respondent was incorporated on 23 December 1953 under the Companies Act 1948 of the United Kingdom. It was a subsidiary of Highlands & Lowlands Para Rubber Co. Ltd. which was one of a group of 11 companies (referred to as "the group") wholly-owned by the principal company. The respondent and all the other members of "the group" were managed by Barlow Boustead Estates Agency Sdn. Bhd. (referred to as "the agent") up to and including the relevant years of assessment. All the staff of "the group" were engaged by "the agent" through standard letters of appointment. The staff so appointed were transferable or interchangeable within "the group". All the companies in "the group" are in the plantation industry. In compliance with the policy of "the group", the administrative staff (*i.e.* the managerial staff) were paid additional remuneration in accordance with the bonus scheme and the letters of appointment.

The managerial staff were each paid a monthly salary and in addition thereto they were entitled to participate in the group bonus scheme in accordance with the standard letters of appointment. On the other hand, the clerical staff (*i.e.* the non-managerial staff) were each paid a bonus at the

discretion of the respondent as there was no contractual obligation on the part of the respondent.

In respect of the managerial staff, the scheme came into operation on 1 January 1961. It was based on a number of factors, *viz.* status of employees, amount of salary drawn, duration of service and planted acreage managed, for which points would be given for equitable distribution of a provision created by reserving 4% of the agricultural profits of "the groups". The amount of payment varied with the number of points earned by each participant. The respondent had been making bonus payments to its managerial staff since the scheme was introduced. As regards the non-managerial staff, for the last 12 years or so they received bonus payments annually in excess of two months' salary. The respondent does not dispute its liability to tax in respect of the discretionary bonus payments to its non-managerial staff in excess of two months' salary. On the other hand, the managerial staff were paid under a contractual obligation tied to profitability and on appropriation of 4% of the agricultural profits of "the group".

For the year of assessment 1975, the appellant disallowed for deduction from the gross income of the respondent the bonus paid to the managerial staff pursuant to the scheme in excess of the limits stipulated in section 39(1)(h) of the Income Tax Act 1967. Accordingly, by a notice of assessment dated 5 January 1980 the appellant informed the respondent that an additional assessment in the sum of $319, 066.50 had been made for the year of assessment 1975.

The respondent contended that the additional remuneration paid to the managerial staff under the group bonus scheme was actually a commission while the appellant argued that the same was a bonus payment and as such for the year of assessment 1975, a sum of $319,066.50 was disallowed for deduction. In other words, the respondent disputed the applicability of section 39(1)(h) to the group bonus scheme of the managerial staff.

The question for the determination of the Special Commissioners was:

"Whether the additional remuneration paid to the administrative staff (*i.e.* the managerial staff) of the appellant under the scheme is a *commission* and therefore deductible as an expense wholly and exclusively incurred in the production of gross income of the appellant within the meaning of section 33 of the Income Tax Act 1967; or is a *bonus* payment within the meaning of section 39(1)(h) of the Act and therefore be disallowed as a deductible expense beyond the limits stipulated therein."

The Special Commissioners decided that it was a bonus payment. On appeal, Harun J. disagreed and held that it was a commission. Hence the appeal.

Section 33 deals with the adjusted income generally and it allows deduction from gross income all outgoings and expenses wholly and exclusively incurred in the production of that gross income. Section 39(1)(h) limits deduction of bonus payment to employees up to two-twelfths of their wages or salaries in so far as the year of assessment 1975 is concerned.

Prior to 1975, there was no restriction imposed by the Revenue as to payment of bonus to any employment. However, in 1975 an amendment was made to section 39(1) of the Income Tax Act 1967 by the addition of paragraph (h) and the relevant provision read:

"Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of –

...

(h) any sum paid by way of a bonus to an employee in excess of two-twelfths of his wage or salary."

Then in 1976, paragraph (h) was amended to read as follows:

"(h) any sum paid by way of bonus to an employee in excess of one thousand ringgit or two-twelfths of his wages or salary whichever is the greater."

It is clear that the payment is contractual. As the payment is contractual, can it be a bonus? The Special Commissioners held that such contractual payment could be a bonus. However, the learned judge disagreed and held that such payment could not be a bonus. So he reversed the decision of the Special Commissioners. At p. 11 of the appeal record, in his judgment the learned judge observed:

"What then is the real character of the payments under the group bonus scheme. Here the Special Commissioners found as a fact that the scheme is based on profits and the individual efforts put in by the managerial staff. It also found that the payments are contractual but went on to hold that the scheme 'merely provides a criteria by which the 'bonus' is paid ...' Therefore it is logical that payment of bonus is tied to performance and profitability. On the other hand, the argument that this sort of payment be termed as 'commission' should not be upheld. Our view is

based on the facts proved or admitted at the hearing and the general principles of law applicable therein."

He then went on to express his views at p. 12:

"In my view therein lies the fallacy of the thinking of the Revenue and the Special Commissioners. It is true that bonus is usually paid when a company makes a profit but it does not follow that bonus will be paid to employees each year the company makes a profit when there is no contractual obligation to pay as in the case of the clerical staff. On the other hand, there is a contractual obligation to pay out 4% of the agricultural profits of the group to the managerial staff. The fact of sharing a percentage of the profits truly deserves the label of 'commission' rather than a 'bonus'. It seems to me that the real distinction between a commission and a bonus is that a commission is contractual whereas a bonus is gratuitous. It is a contradiction in terms to speak of a *contractual bonus* because bonus by definition is gratuitous and there cannot be a contract to do something which is not expected.

The trouble is that the word 'bonus' has been used too freely in contracts of employment in this country to denote a lump sum payment made each year in addition to wages or salary whether contractual or not. If the lump sum payable is a fixed sum or an amount certain and contractual it is in fact *deferred salary*, *e.g.* the 13th month salary, and should not be called a bonus. If the payment is not contractual then it is truly a *bonus*. If the payment is contractual, based on individual effort and in the form of a percentage as an incentive to productivity it is more appropriate to describe the payment as a *commission* ..."

The Special Commissioners sought guidance from decided cases. *Shelford* v. *Mosay*[1] is not a tax case but the bonus payment there is clearly contractual. In that case at pp. 158 and 159, Lord Reading C.J. said:

"The sole question in this case is whether or not a bonus agreed to be paid to a seaman as recorded in the ship's articles is to be treated as wages, or whether it can be regarded as something apart from wages... 'Bonus' in such a case as the present one is in truth nothing else but an euphemism for 'addition to wages'. There may be special reasons for calling it a bonus – *e.g.* it may be a convenient method of conveying to a sailor the fact that he is being paid something extra during, and only during, the war... The definition of the word 'wages' in section 742 of the Merchant Shipping Act 1894 makes it clear that 'wages' include emoluments, and I hold a bonus also, although the statute does not expressly use the word 'bonus'."

At p. 297 in *Sutton* v. *Attorney-General*,[2] the Earl of Birkenhead stated:

"... I have no doubt that the war bonuses were part of the civilian's pay. For good and sufficient reasons that part of the pay which was intended to remain permanently was distinguished from that part which was granted only for a period and was to cease when the need which occasioned it had disappeared; but it was nonetheless pay. He was entitled to be paid for the time being for his services, the total amount of permanent pay and war bonuses. The term 'bonus' may, of course, be properly used to describe payments made of grace and not as of right. But it nevertheless may also include, as here, payments made because legally due, but which the parties contemplate will not continue indefinitely...".

The Special Commissioners rejected the contention of the respondent that although payment was mentioned as bonus it was actually a commission. They considered that commission was a payment made to an agent for agency work done and that the managerial staff were under direct employment of the respondent and not its agents. They were paid monthly salaries and, in addition, annual bonuses. They were never appointed agents. In support, they referred to *Drielsma* v. *Marifold*[3] where Lord Lindley said at p. 104:

"... An auctioneer who is employed by a solicitor to sell... is acting as an agent; and if you take the remuneration of the agent to be what is generally meant by the word 'commission', everything you pay him for his services in the course of his agency comes within the expression of the word 'commission'."

In the same case Davey L.J. stated at p. 107:

"... Commission is *prima facie* the payment made to an agent for agency work, usually according to a scale – it may be an ad valorem scale, but not necessarily an ad valorem scale. It is... the most general word that can be used to describe the remuneration paid to an agent for an agency work other than a salary...".

The respondent used the word "bonus" throughout. The Special Commissioners had perused the letter of appointment and found no ambiguity at all in respect of the term "bonus scheme". The letter dated 21 September 1960 from the respondent's agents Messrs. Barlow & Co. (Malaya) Ltd. is clear on the group bonus scheme. The appellant, therefore, contended that the Special Commissioners were correct to say that this amounted to an admission that the payment was a bonus. In support of their view that they could not interpret "bonus scheme" to mean "commission scheme" as suggested by the respondent, the Special Commissioners relied on the judgment of Viscount Dilhorne in *International Investment Ltd.* v. *Comptroller-General of Inland Revenue*[4] where he said at p. 6:

"First, the appellant company's accountants wrote on 16 August 1962, in reply to an enquiry on a standard form from the Inland Revenue stating that 'the nature of the business conducted by the company is dealing in immovable property and land development'. In their Lordships' view that statement is certainly capable of being read as a direct admission that the company was carrying on the business of dealing in land. Whether it should be read, and,

if so, what importance should be attached to it, are questions for the Special Commissioners.

Second, the work in progress on the International Building was shown in the balance sheet at 31 December 1962 under current assets. That is difficult to reconcile with another entry in the balance sheet showing the land on which the building was being erected as a fixed asset, but it is consistent with the fact that the building work during 1962 and 1963 was entirely financed by bank overdraft and other short-term loans. The Special Commissioners were fully entitled to refuse, as they did, to regard the entry under current assets as a mistake and to regard it as an indication that the appellant company was treating the building as trading stock, not as an investment."

In the case under appeal, the respondent has always treated the payment as a bonus under the group bonus scheme. In fact, the respondent admitted, in the letter dated 21 September 1960, the payment to be a bonus. A party should not be allowed to blow hot and cold. It was contended that the Special Commissioners did not appreciate the true nature of the subject in issue when they referred to the question of onus of proof and the *International Investment* case.[4] That case was one in which it had to be determined whether the company carried on the business of dealing in land. The facts and evidence for such determination was not only essential but critical. In response to a direct written query by the Revenue, the company's accountants replied that the company was a land dealing company. In the absence of any other contradictory evidence, the statement of the company's accountants, *inter alia,* was held to be conclusive proof of the nature of its business. It was a case which involved statutory interpretation.

The Act does not define the word "bonus" nor "commission". The Special Commissioners were aware of this when they made this observation:

"Since we are unable to find any Malaysian authority on the legal construction relating to bonus payment or commission payment, we think that it may be desirable to cite the following relevant cases which have been decided by the Special Commissioners of Income Tax for consideration."

They relied on three cases, namely, (1) *Chung Khiaw Finance* case, (2) *Tasek Cement Bhd.*, and (3) *Barlow Bulking Sdn. Bhd.* The first two cases decided by the Special Commissioners have nothing to do with contractual incentive schemes or arrangements. The Barlow Bulking Sdn. Bhd. was an associate company of the respondent and since the matter dealt with distribution of agricultural profits under a contracted scheme, the respondent decided, among other considerations, to proceed with this appeal as a test case.

The learned judge had also observed that the words "bonus" and "commission" are not defined in the Act, and that the general rule is that words in a statute should be given their ordinary meaning. He then referred to the *Shorter Oxford Dictionary* which defines bonus – "a boon or gift over and above what is normally due. A premium for services rendered or expected." Commission – "a pro rata remuneration for work done as agent (1725)".

It is the submission of the respondent that on the facts agreed the real character of the payment, notwithstanding the historical nomenclature that has attached to it, can be ascertained. On this basis, the respondent accepts that the discretionary payment made to the non-managerial staff is a bonus. The non-managerial staff have no entitlement. The bonus may be made out of profits, as is normally the case. Equally, they may be made out of reserves, capital realization or even borrowings. There is no restriction as to how they are sourced, being in the nature of gifts over and above what is normally due as remuneration.

It is the contention of the respondent that there is no question of gift or boon or gratuitous or discretionary payment. The payment is based on profitability. Payments to the two categories of the staff are so distinct that the respondent submits that the payment to the managerial staff is endowed with all the clear characteristics of a commission and not that of a bonus. On the other hand, the appellant relied on the fact that the term used in the incentive scheme refers to it as a "bonus scheme". The Special Commissioners were aware of this but they were quick to remind themselves that "the label itself is not conclusive".

In the absence of any statutory definition of the words "bonus" and "commission" and to determine the character of a payment in respect of employment, the respondent sought guidance in decisions of the Industrial Court in regard to bonus payments. They referred to two cases, *viz.* Award No. 157/80 and Award No. 158/80. Briefly, what the Industrial Court laid down is that a bonus may be discretionary (*i.e.* non-contractual or contractual). In the event that it is contractual, it is nothing more than deferred wages. The respondent said the Special Commissioners avoided the entire matter by viewing the Industrial Court as a court of equity and invoked the maxim that "there is no equity about tax".

In the two cases mentioned, the Industrial Court was not exercising its equitable jurisdiction

but addressing itself on a matter of statutory interpretation. It would be wrong to shut out the rulings of the Industrial Court that throws light on a highly pertinent aspect of a payment in respect of employment. The Special Commissioners' view that commissions are payable to agents, not employees, does gross violence to the very express provisions to section 13(1)(a) which was cited by the learned judge. It reads:

"13(1). Gross income of an employee in respect of gains or profits from an employment includes –

(a) any wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment;"

Commissions and bonuses are expressly recognized as being part of an employee's income. The law does not restrict payment of commissions to agents only.

The respondent submits that the clearest statement on the meaning of the word "commission" is to be found in *Mannix: Australia Income Tax Law & Practice,* Vol. 1. This was cited with approval by the learned judge when he said:

"The Act clearly provides that commissions are payable to employees and not restricted to agents when it was first used in 1725. That the word commission does not have such a restricted meaning is well illustrated in *Mannix: Australia Income Tax Law & Practice* where reference is made to the word 'commission'. There, as here, the definition of income from personal exertion includes 'commissions'. There too, the word commission is not defined in the law. Mannix quotes a passage from a judgment which reads:

'In its relevant sense the word 'commission' has no technical meaning. The relevant sense of the word is, of course, its commercial sense, but we are satisfied that it has no precise meaning even in commerce. It is, of course, applied – and no doubt most frequently – to the ordinary remuneration of an agent in the form of a percentage on the value of business done. It is sometimes applied to remuneration received in that form by an employee. It is obvious, however, that the word is not confined in commerce to the remuneration of agents or employees, whether in the form of a percentage or otherwise... It appears that commission may be earned merely by doing something which results in contracting parties being brought together: see *Wharton's Law Lexicon* – citing *Green* v. *Bartlett.*(5) We have formed the opinion that the word 'commission' is appropriate to describe any payment received as a reward for doing some act, or imparting some information in consequence of which the payer either does business or is enabled to do it."

The Special Commissioners' view that a commission is one that is payable to an agent and not an employee is not only unfounded in law but against existing authorities. In *Wolfson* v. *Commissioners of Inland Revenue*(6) Lord Simonds remarked (at p. 169):

"... It is not the function of a court of law to give to words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the legislature thought of it, would have been covered by appropriate words. It is the duty of the court to give to the words of this sub-section their reasonable meaning and I must decline on any ground of policy to give to them a meaning which, with all respect to the dissentient Lord Justice, I regard as little short of extravagant...".

The respondent submitted that the facts of incentive and entitlement to share in the profit of a percentage stamp the payments with the quality of a commission.

Further, it was submitted that if the words give rise to certain ambiguity in a legal sense in that the words are "open to diverse interpretation, *i.e.* capable of two alternative meanings", then the construction most favourable to the taxpayer should be adopted. In support, the following cases were cited: *R.* v. *Tolson,*(7) *Lord Howard de Walden* v. *I.R.C.;*(8) *Lord Vestey's Executors* v. *I.R.C.;*(9) *I.R.C.* v. *Ross & Coulter;*(10) *Atkinson (Inspector of Taxes)* v. *Goodlass Wall & Lead Industries Ltd;*(11) *Hughes (Inspector of Taxes)* v. *Bank of New Zealand;*(12) and *Comptroller-General of Inland Revenue, Malaysia* v. *T.*(13)

In the case under appeal, we are not concerned with such questions of fact and inference to be made on the facts in evidence. Here, the facts have been agreed. The only question is, on the basis of agreed facts, whether the payment of the managerial staff is a bonus or a commission.

It is difficult to lay down any general rule as to what "bonus" is. *Jowitt's Dictionary on English Law,* 2nd Ed. Vol. 1 at p. 238 defines "bonus" to mean premium or advantage; an occasional extra dividend; a gratuity. The Income Tax Act 1967 does not define the word "bonus". Both the learned judge and Special Commissioners accepted "bonus" to mean "a boon or gift over and above what is normally due as remuneration to the receiver". They were merely following what Stirling J. did in *Re Eddystone Marine Insurance*(14) when he said:

"I adopt the definition of 'bonus' given in the *New English Dictionary, viz.* a boon or gift over and above what is normally due as remuneration to the receiver, and which is therefore something wholly to the good."

We are not unmindful that the label itself is not conclusive. Thus in *Commissioners of Inland Revenue* v. *Wesleyan And General Assurance Society,*[15] the taxpayer sought to call an annuity a loan while the Revenue contended that it was an annuity and not a loan. The House of Lords decided that it was an annuity. At p. 25, Viscount Simon made the following observation:

"It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it."

Reference may be made to oft-quoted statements on a rule of interpretation in *Halsbury's Laws of England,* 4th Ed. Vol. 23 p. 68, para. 82 which reads:

"In considering the application of the Income Tax Acts to particular transactions and documents the true legal rights of the parties are to be regarded irrespective of a mere name given to the transaction or document, but this rule does not authorize any *a priori* construction of a legal situation for the purpose of attracting tax to it or indeed of allowing escape from liability."

As O'Connor J. said in the Canadian case of *Great Western Garment Co. Ltd.* v. *Minister of National Revenue*[16] at p. 467:

"A bonus may be a mere gift or gratuity as a gesture of goodwill, and not enforceable, or it may be something which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled. But in both cases it is something in addition to or in excess of that which is ordinarily received."

It is the same in the instant case whether the payment is made to the managerial or the non-managerial staff as it is something in addition to or in excess of that which is ordinarily received. The payment may be gratuitous as in the case of the non-managerial staff or it may be payment which the managerial staff are entitled as incentive but nevertheless it is still a "bonus". The payment to the managerial staff was only paid on the happening of a condition precedent and which was enforceable once the condition was fulfilled. To adopt what the Earl of Birkenhead said in *Sutton* v. *Attorney-General,*[2] "bonus" in such a case as the present case is in truth nothing else but an euphemism for "addition to wages".

The payment may be contractual but that does not make it a "commission". It seems ridiculous to pay the non-managerial staff a bonus and the managerial staff a commission just because it is contractual. Also, the employers have clearly expressed the scheme to be a bonus scheme from the very beginning. There has never been any indication that the additional payment has even been treated as commission. It is only when the employers found that they had to pay a substantial tax that they contended that the payment was a "commission", not "bonus", in order to avoid liability to tax.

For reasons given, we would allow the appeal with costs here and the court below. We would restore the decision of the Special Commissioners. Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.*

ING HONG AUTO SPARES SDN. BHD. v. THE HONGKONG & SHANGHAI BANKING CORPORATION & ANOR.

[A.C.J. (L.C. Vohrah J.) 28 January 1988]

[Johore Bahru – Civil Appeal No. 30 of 1983]

Civil Procedure – Judgment obtained – Execution against charged land – Order for auction sale – Ex parte orders to vary special conditions of sale – Application to set aside such orders – Applications heard and orders made by three magistrates – Appeal to High Court – Observations – Subordinate Courts Rules 1980, O. 24 r. 28, O. 30A r. 1.

In this appeal, the appellant appeals against the decision of the magistrate disallowing the appellant's application made under Order 24 rule 28 of the Subordinate Courts Rules 1980 to set aside an order made earlier by another magistrate varying the conditions of an auction sale of a piece of land after the sale, and confirming the sale without notice to the judgment creditors who had an interest in the proceeds of the sale.

On 27 April 1982, the appellant obtained judgment against one Lim Gek Kew, the defendant. On 22 December 1981, Hock Hua Bank Berhad ("HHBB") had obtained judgment against Lim and land held under H.S.(D) 14624 for P.T.D. 11604 ("the said property"), Mukim of Plentong, was ordered to be sold on 11 October 1982. On 9 October 1982, however, the first respondent, as chargee of the said property, filed an objection and an interpleader